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Supreme Court, U.S.

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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

TAHIR M. BAWAZIR,

Petitioner,

v.

SHEIKH KHALID BIN MAHFOUZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause permits a state to exercise jurisdiction over a nonresident defendant who directs his nonresident agent to conduct business in the forum state, when the agent asserts claims against the principal in the forum state for business activities he undertook for the principal's economic benefit in the forum state?

2. Whether the purposeful availment requirement under the Due Process Clause is satisfied when a nonresident plaintiff sues a nonresident defendant for claims that arise from a contract that has a substantial connection with the forum state, and is governed by the law of the forum state, even though the initial agreement between the parties is entered abroad?

3. Whether the purposeful availment requirement under the Due Process Clause may only be satisfied if a nonresident defendant solicits the initial contact for a business transaction in the forum state, notwithstanding that the nonresident defendant creates continuing obligations and had prior business dealings with the forum state from which he derived substantial economic benefit?

PARTIES TO THE PROCEEDING

Tahir M. Bawazīr ("Bawazir") was a relator below and is a petitioner here. Sheikh Khalid Bin Mahfouz ("Sheikh Mahfouz") was a respondent below and is a respondent here. The Boeing Company ("Boeing") was a respondent below but is not a respondent in this Petition.[1]

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[1] Bawazir files this Petition with respect to the decision in favor of Sheikh Mahfouz that Washington State could not assert personal jurisdiction over him under the Due Process Clause. Bawazir does not seek review of the decision in favor of Boeing, although he believes that decision was also wrongly decided.

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OPINIONS BELOW

Petitioner seeks a Writ of Certiorari for review of the Washington State Court of Appeals' (Division I) decision (the "Washington State Decision") dated April 3, 2000, captioned *Tahir M. Bawazir v. The Boeing Company, Sheikh Khalid Bin Mahfouz,* No. 43375-0-1. On May 3, 2000, Petitioner filed a Petition for Review with the Washington State Supreme Court, captioned *Tahir M. Bawazir v. The Boeing Company, Sheikh Khalid Bin Mahfouz,* No. 69847-3. The Washington State Supreme Court denied the Petition for Review in an order dated October 11, 2000. The Washington State Supreme Court's order terminated this action in the Washington State courts.

This action originally commenced in Washington State Superior Court (King County), against Sheikh Mahfouz and Boeing, captioned *Tahir M. Bawazir v. The Boeing Company, Sheikh Khalid Bin Mahfouz,* No. 98-2-14646-0SEA. Both defendants moved for dismissal under Superior Court Civil Rule 12(b). In his motion, Sheikh Mahfouz disputed many facts alleged in the complaint, but provided no evidence or affidavits in support of his motion. On August 28, 1998, the trial court granted Sheikh Mahfouz's motion to dismiss but did not issue a written opinion in support of its decision.[2]

Copies of the Washington State Decision and related orders are included in the Appendix. None of these orders were published.

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[2]The trial court granted Boeing's motion to dismiss at the same time it dismissed the complaint against Sheikh Mahfouz.

JURISDICTIONAL STATEMENT

The Washington State Supreme Court's Order entered on October 11, 2000, constitutes a final judgment terminating the proceedings below. Accordingly, this Court has jurisdiction over the Petition. *See* 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The constitutional provision pertinent to this Petition is the Due Process Clause of the United States Constitution, Amendment XIV:

> No State shall make or enforce any law which shall . . . deprive any person of liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

A. Overview of the Case.

This Petition arises from the dismissal of a lawsuit filed by Bawazir against Sheikh Mahfouz, a Saudi national who has transacted substantial and continuing business in Washington. The trial court ruled it lacked personal jurisdiction over Sheikh Mahfouz, even though this lawsuit arises from a series of consulting agreements (collectively referred to as the "Agreements") Sheikh Mahfouz entered into with Boeing, which is headquartered in Seattle, Washington.

Pursuant to an oral agreement Bawazir entered into with Sheikh Mahfouz, Bawazir worked as Sheikh Mahfouz's managing agent under the Agreements for six years, assisting Sheikh Mahfouz and Boeing in their sale of airplanes manufactured in Washington State to Saudia

Airlines, the national air carrier of Saudi Arabia. Bawazir's claims arise out of commissions that were to have been paid under the Agreements pursuant to the oral agreement between him and Sheikh Mahfouz.

Sheikh Mahfouz will receive millions of dollars in commissions from Boeing under the Agreements. Payments are to be made from Boeing's Washington State headquarters as aircraft are delivered to Saudia Airlines, and future commission payments remain forthcoming. Bawazir seeks a fair share of the commissions Sheikh Mahfouz promised to pay him for services he rendered as Sheikh Mahfouz's managing agent under the Agreements.

Sheikh Mahfouz directed and controlled Bawazir to work as his managing agent under the Agreements. Bawazir performed substantial services as Sheikh Mahfouz's managing agent, including making many visits on his behalf to Boeing's headquarters in Washington State. In addition, Sheikh Mahfouz corresponded regularly with Boeing representatives in Washington State, renewed his annual consulting relationship with Boeing for six successive years, and traveled to Boeing's headquarters in Washington State for an important meeting to address financing issues that threatened to terminate the transaction.

Eventually, Boeing won a $5.2 billion airplane contract with Saudia Airlines. Boeing's airplane contract with Saudia Airlines was so important to Washington State and the U.S. economy that President Clinton announced the sale at a White House ceremony with Washington State's congressional delegation at his side.

This dispute arose after Boeing issued a multi-million dollar commission check to Bawazir. Bawazir deposited

the funds in a special bank account opened by him in Sheikh Mahfouz's name, pursuant to an understanding with Sheikh Mahfouz that the commissions would be shared. Sheikh Mahfouz then abruptly terminated his relationship with Bawazir and instructed Boeing to stop issuing further commission payments to Bawazir. Subsequently, Boeing and Sheikh Mahfouz disavowed any obligation to compensate Bawazir for his extensive work on behalf of Sheikh Mahfouz.

Petitioner seeks relief from this Court because the Washington State Decision weakens the extraterritorial reach of the Due Process Clause over foreign persons conducting business with a forum state. The Washington State Decision raises important questions of constitutional law about whether foreign persons deriving substantial economic benefit from conducting international commerce in a forum state satisfy the purposeful availment requirement under the Due Process Clause. Furthermore, the Washington State Decision curtails the expanding reach of the Due Process Clause in this age of increasing international transactions, and will have a chilling effect on international commerce.

Finally, the Washington State Decision highlights a conflict among the lower courts as to whether (i) an agent may impute his activities in the forum state to assert that state's jurisdiction over litigation against the principal, and (ii) whether solicitation of business in the forum state is a prerequisite to satisfy the purposeful availment requirement under the Due Process Clause. The Washington State Decision also conflicts with this Court's precedent that when a claim arises from a contract which has a substantial connection with the forum state, the Due Process Clause is satisfied and permits resulting litigation in that state.

As the law currently stands, nonresidents may be subject to the jurisdiction of some states, but not others, for the same conduct because a conflict among the lower courts exists as to when the purposeful availment requirement under the Due Process Clause is satisfied. Review is necessary to resolve these conflicts in the law and to ensure that foreign individuals do not abuse the economic benefits they derive from engaging in business in a forum state by using their international status as a shield to avoid their in-state obligations. Review is also necessary because Washington State is the only practical forum in which Bawazir can obtain relief against Sheikh Mahfouz.

B. Sheikh Mahfouz Transacted Substantial and Continuous Business in Washington State.

1. Sheikh Mahfouz Transacted Business Unrelated to This Litigation.

Sheikh Mahfouz is no stranger to Boeing, Washington State, or the United States. Boeing employed him in the 1980s to assist in the sale of Boeing aircraft in Saudi Arabia. CP 678-79 ¶17.[3] His family maintained a residence in Washington State, and he is believed to own several businesses in Washington State. Appendix 62a ¶¶7-8.[4] He also has an ongoing business relationship with Boeing for the operation of his two personal Boeing

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[3]Clerk's Papers filed with the Washington State Court of Appeals under seal pursuant to a protective order are referenced as "CP" in this Petition. Bawazir has filed a motion with this Court to lodge these Clerk's Papers under seal.

[4]In separate proceedings, the United States Government attached Sheikh Mahfouz's U.S. assets in connection with the notorious *BCCI* litigation, which facially appear to include the names of Washington entities under his control. Appendix 62a ¶6; 64a-69a.

aircraft, and for decades has conducted business with The Frank Russell Company, which is headquartered in Tacoma, Washington. CP 676-77.

2. Sheikh Mahfouz Transacted Business in Washington State Pursuant to His Consulting Relationship with Boeing.

For six years Sheikh Mahfouz and Bawazir worked with Boeing to compete against Airbus and McDonnell Douglas for an airplane contract with Saudia Airlines. Appendix 33a-39a. Their resulting contacts centered on business activities in Washington State, where Boeing's headquarters are located and its airplanes are manufactured.

Initially, Boeing approached Sheikh Mahfouz about entering into a consulting relationship for the sale of Boeing aircraft to Saudia Airlines. Appendix 35a ¶ 11. Bawazir and Sheikh Mahfouz formed a joint venture to pursue the consulting relationship with Boeing, and Sheikh Mahfouz agreed Bawazir would be the managing agent of the joint venture. Appendix 43a, 58a-59a ¶¶ 36, 122-125. Subsequently, Sheikh Mahfouz asked Bawazir to meet with Boeing on his behalf to pursue discussions about the consulting relationship because they were one of several teams "vying" to be hired. Appendix 36a ¶ 15. Sheikh Mahfouz also solicited George Russell, Chairman and CEO of The Frank Russell Company, to be a reference for his Boeing consultant application. *Id.*

In 1992, Sheikh Mahfouz entered into the first of a series of consulting Agreements with Boeing. Appendix 36a-37a ¶ 16. Sheikh Mahfouz renewed the Agree-

ments annually in 1993, 1994, 1995, and 1996. Appendix 47a ¶¶48-49. The Agreements were governed by Washington law. Appendix 37a ¶19.

Boeing's sale of aircraft to Saudia Airlines was contingent on financing. Appendix 46a, 47a ¶¶43-44, 46; CP 681 ¶¶27-28. To help secure Boeing's airplane contract with Saudia Airlines (and the resulting commission payments), Sheikh Mahfouz and Bawazir visited Seattle in May 1994 to meet with Boeing Chairman Frank Shrontz and others at Boeing's headquarters. CP 680-81 ¶¶24-28. Financing issues that threatened the sale of Boeing aircraft to Saudia Airlines were ultimately resolved. Appendix 48a ¶50.

3. Bawazir Worked as Sheikh Mahfouz's Agent for Six Years Under the Agreements.

Boeing and Sheikh Mahfouz understood that "Bawazir would be a significant participant in a venture with Sheikh Mahfouz" under the Agreements. Appendix 36a-37a ¶16. Bawazir initialed each page of the Agreements and is referred to as a "key person" and "principal" in the Agreements.[5] Appendix 37a, 41a ¶¶17, 30. Bawazir was Sheikh Mahfouz's managing agent in Washington State during this six-year period. Appendix 43a, 58a-59a ¶¶36, 122-125.

Bawazir and Sheikh Mahfouz each understood they were to be paid only if Boeing won the contract to sell its airplanes to Saudia Airlines. Appendix 37a ¶18.[6] Sheikh Mahfouz assured Bawazir orally he would "be

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[5]The Agreements define "principal" to mean acting as a "representative" of Sheikh Mahfouz. CP 720.

[6]The total contingent fee is calculated as a percentage of the value of aircraft delivered to Saudia Airlines. CP 815 ¶5.1.

entitled to share" the commissions paid by *Boeing*. Appendix 43a ¶35. Culturally, such oral agreements in Saudi Arabia are common, and the sharing of profits between Sheikh Mahfouz and Bawazir as business partners was an established practice between them in their prior business ventures. Appendix 36a ¶14.

Bawazir's work as Sheikh Mahfouz's managing agent under the Agreements included:

- Attending many business meetings with Boeing representatives in Seattle;
- Corresponding with Boeing representatives for six years in Seattle;
- Communicating by telephone several hours per week with Boeing management in Seattle;
- Working with Boeing representatives in Seattle to prepare documents about the terms and conditions of the sale of aircraft built in Washington State to Saudia Airlines;
- Providing information to Boeing representatitives in Seattle about competing proposals from Airbus and McDonnell Douglas;
- Assisting Boeing representatives in Seattle in preparing correspondence and communications to Saudi Royal officials; and
- Signing letters addressed to Saudi Arabia's King that outlined the terms of Boeing's contract offer to Saudia.

CP 677-78; Appendix 40a, 41a, 43a. Bawazir devoted 40-50 percent of his time each year to Boeing's sales efforts. Appendix 40a-41a ¶29.

Bawazir's central role as an agent of Sheikh Mahfouz under the Agreements was further highlighted by two

events. First, in 1992 the U.S. government indicted Sheikh Mahfouz for criminal fraud in the Bank of Commerce and Credit International ("BCCI") scandal.[7] Second, in 1993 certain members of the Saudi Royal Family sought to have Boeing cancel the Agreements in favor of someone with closer ties to the Royal Family. Appendix 41a-43a.[8] These events required Sheikh Mahfouz and Boeing to rely even more heavily on Bawazir to perform services under the Agreements, and Bawazir made several visits to Boeing's Washington State headquarters during this period. Appendix 40a, 44a; CP 677 ¶ 14.

C. Sheikh Mahfouz Reaped the Benefits of Conducting Business in Washington State but Seeks to Avoid His Resulting Legal Obligations.

In October 1995, Boeing secured a $5.2 billion airplane contract with Saudia Airlines. Appendix 48a ¶ 50. The contract was so important President Clinton announced the sale at a White House ceremoney with Washington State's congressional delegation and Boeing's then-current Chairman, Frank Shrontz, attending.

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[7] On July 1, 1992, a New York Grand Jury issued an indictment against Sheikh Mahfouz and a warrant for his arrest because of his BCCI activities. Until Sheikh Mahfouz settled the charges with U.S. authorities in December 1993, Boeing and Sheikh Mahfouz relied almost exclusively on Bawazir to perform work under the Agreements. Appendix 39a-40a.

[8] Bawazir and Boeing implemented a strategy to resolve this issue and not cancel the Agreements. Sheikh Mahfouz subsequently renewed the Agreements upon their expiration in 1994, 1995, and 1996 after Bawazir "reiterated his understanding" the commission payments would be shared if Boeing was successful in selling airplanes to Saudia Airlines. Appendix 43a, 47a ¶¶ 35, 48.

Appendix 45a-46a ¶42.[9] Boeing Chairman Frank Shrontz personally thanked Bawazir for his role in Boeing's success in winning the airplane contract with Saudia Airlines. Shrontz wrote:

> Throughout the Saudia campaign, Bob consistently reported to me *how helpful you were in all phases leading up to the signature of the contract.*

Appendix 48a ¶52 (emphasis added).

In August 1997, Boeing issued a multi-million dollar commission check to "Mr. Tahir M. Bawazir." Appendix 48a-49a ¶54; CP 684 ¶38.[10] Sheikh Mahfouz then instructed Boeing in a letter addressed to its "Chairman" that "all future commission checks be made directly payable to me." Appendix 49a ¶55. As a result, Sheikh Mahfouz will receive millions in commission payments for work performed by Bawazir, but Bawazir will receive nothing in return because Sheikh Mahfouz refuses to pay Bawazir anything – despite Bawazir's six years of work as Sheikh Mahfouz's managing agent under the Agreements.[11]

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[9] President Clinton stated "This deal will support tens of thousands of jobs not only in California and Washington, where the planes will be built, but in Missouri, Kansas, Arkansas, Utah, and elsewhere, where Boeing and McDonnell Douglas have extensive operations." *Id.*

[10] Bawazir deposited the funds in a Special Project Account opened by him in Sheikh Mahfouz's name, with the understanding Sheikh Mahfouz would distribute from this account a share of the commission payments to Bawazir. Appendix 48a-50a ¶¶53-60. Sheikh Mahfouz never paid Bawazir.

[11] Bawazir asserted breach of contract, third-party beneficiary, unjust enrichment, restitution and quantum merit claims against Sheikh Mahfouz but the trial court and appellate court did not address the merits of Bawazir's claims. Appendix 51a-58a.

D. Bawazir Cannot Obtain Legal Redress in Saudi Arabia.

Bawazir will be deprived of legal redress if forced to pursue his claims against Sheikh Mahfouz in Saudi Arabia. The unpaid commission funds, critical witnesses, and significant documentary evidence are all located in Washington State. The majority of witnesses identified by Bawazir are Boeing employees who cannot testify, or be subject to compulsory process, if this lawsuit is prosecuted in Saudi Arabia.[12] Consequently, Bawazir will not have access to the evidence he needs to prove his claims in a Saudi forum.

REASONS FOR GRANTING THE WRIT

A. The Petition Raises an Important Federal Question About the Extraterritorial Reach of the Due Process Clause When Foreign Persons Conduct Substantial International Commerce with a Forum State.

Washington State courts may exercise jurisdiction over nonresident defendants to the full extent permitted by the Due Processs Clause of the U.S. Constitution. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 771, 783 P.2d 78 (1989), *rev'd on other grounds*, 449 U.S. 807 (1990). This Petition raises important questions of

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[12] Only Muslims may testify in Saudi courts. *See* D. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 Geo. Wash. J. Int'l L. & Econ. 131, 151 (1992) (Saudi courts "require that all witnesses be Muslims"). Further, Saudi Arabian law does not provide for pretrial discovery or other procedures that would ensure Bawazir has access to Boeing records maintained in Seattle, Washington. *Id.* at 150.

constitutional law as to whether a state may assert personal jurisdiction over a nonresident conducting international commerce with the forum "consistent with due process." *Burnham v. Superior Court of California*, 495 U.S. 604, 609 (1990).

This Court may review de novo the Washington State Decision dismissing the claims for lack of personal jurisdiction. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980). The pleadings and affidavits should be considered "in the light most favorable to the party opposing the motion." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982).

B. Supreme Court Review Is Necessary to Address an Unsettled Question Under the Due Process Clause: Whether a Nonresident Principal Who Directs His Nonresident Agent to Conduct Business in a Forum Purposefully Avails Himself to the Jurisdiction of the Forum State When the Agent Is the Plaintiff.

1. Review Is Necessary to Resolve an Irreconcilable Conflict Among the Lower Courts.

Washington State's long-arm statute explicitly subjects any person "who in person or *through an agent*" transacts business in Washington State to its jurisdiction. RCW 4.28.185 (emphasis added). There is no dispute that Bawazir acted "as Mahfouz's agent" in Washington State under the Agreements. Appendix 24a. Rather, the only dispute is whether Bawazir's conduct may "be imputed to Mahfouz to satisfy the purposeful act requirement" under the Due Process Clause. *Id.* An irrecon-

cilable conflict among the lower courts exists as to whether jurisdiction may be asserted over a foreign defendant when the acts of his agent would otherwise clearly satisfy the jurisdictional nexus required to meet the minimum due process requirements under the Constitution.

Numerous courts have ruled that an agent may sue his nonresident principal in connection with a lawsuit arising out of the agent's activity in the forum state.[13]

Other courts have adopted a much narrower rule, like Washington State, which permits everybody *but* the agent to sue the principal for activities conducted by the agent in the forum on the principal's behalf.[14]

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[13] *See, e.g., Chan. v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1405-06 (9th Cir. 1994) (activities by agent in forum sufficient to confer jurisdiction); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215 (7th Cir. 1984) (jurisdiction sufficient on the basis of defendant corporation's agent's activities in the forum state); *Snyder v. Hampton Industries, Inc.*, 521 F. Supp. 130, 146 (D. Md. 1981) (jurisdiction asserted over nonresident defendant when plaintiff, a sales agent of defendant, sought commissions owed for work performed in the forum state); *Terry, Inc. v. Sales Service Mach. Tool Co.*, 414 N.W.2d 568, 572 (Minn. Ct. App. 1988) (jurisdiction asserted over nonresident defendant because plaintiff's activities as a sales agent of the nonresident within the forum state sufficient under the Due Process Clause); *Rose v. Silver*, 394 A.2d 1368, 1372 (D.C. 1978) (jurisdiction asserted over nonresident when plaintiff, a lawyer for defendant, sought fees for work performed in the forum state); *Zerbel v. H.L. Federman & Co.*, 179 N.W.2d 872, 877 (Wis. 1970) (jurisdiction asserted over nonresident defendant when plaintiff performed services for defendant in the forum state).

[14] *See, e.g., New World Capital Corp. v. Poole Truck Line, Inc.*, 612 F. Supp. 166, 172 (S.D.N.Y. 1985) (an agent cannot impute his activities in the forum state to assert jurisdiction over the principal); *Metropolitan Air Serv., Inc. v. Penberthy Aircraft Leasing Co.*, 648 F. Supp. 1153, 1157 (S.D.N.Y. 1986) (following

[footnote continued]

The lower courts' contradictory interpretation of the Due Process Clause in this context cannot be reconciled. Review is necessary to resolve the resulting confusion and uncertainty over whether nonresidents engaged in international commerce may be subject to the jurisdiction of some states, but not others, for the same conduct. It will also promote uniform decisions among states, like Washington State, that exercise jurisdiction to the full extent permitted under the Due Process Clause.

Establishing a consistent rule when persons subject themselves to the jurisdiction of a forum state is critical to U.S. international trade because "[e]nhancing legal certainty for international sales contracts will serve the interests of all parties engaged in commerce by facilitating international trade."[15] The absence of a consistent jurisdictional rule will have a detrimental impact on U.S. international trade.

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the "Haar" rule about not imputing an agent's activities in the forum state to assert jurisdiction over the principal but criticizing the rule); *Zavian v. Foudy*, 747 A.2d 764, 770 (Md. Ct. Spec. App. 2000) (agent cannot attribute its activities in forum for the purposes of establishing jurisdiction over the nonresident defendant); *Haar v. Armendaris Corp.*, 31 N.Y.2d 1040 (N.Y. 1973) (an agent cannot attribute its activities to the principal for purposes of asserting jurisdiction).

[15] *See* Ronald Reagan, A Letter of Transmittal to the Senate of the United States, on the Subject of the United Nations Convention on Contracts for the International Sale of Goods (1983), *reprinted in The Convention for the International Sale of Goods: A Handbook of Basic Materials*, at 71 (Reid R. Kathrein and Daniel Barstow Magraw eds., American Bar Assoc. Sect. of Int'l Law 1987); *see also International Sale of Goods, 1984, Hearing Before the Comm. of Foreign Relations*, 98th Cong. 1 (1984) ("International traders need a consistent and understandable set of rules to govern their transactions").

2. The Washington State Decision Raises a Novel Question About the Scope of the Due Process Clause When the Agent Is the Plaintiff.

The Washington State Court of Appeals adopted an extremely narrow and controversial rule that "where an agent sues his principal, he cannot impute his own acts in the forum as a basis for obtaining jurisdiction over the non-domiciliary principal." Appendix 24a.[16] This unsettled issue has been rejected by other courts and never addressed by this Court. Moreover, Washington State's unduly narrow construction of the Due Process Clause contravenes the "inevitable relaxation of the strict limits on state jurisdiction over nonresident individuals." *Burnham v. Superior Court of California*, 495 U.S. 604, 617 (1990).

This holding insulates nonresidents from obligations to their agents, even when they direct their agents to engage in activities where the nonresident is sued. *Cf. International Shoe Co. v. Washington*, 326 U.S. 310, 313 (1945) (nonresident corporation subject to jurisdiction because it directed the activities of its salespeople in the forum state).

The Washington State rule is also illogical. On the one hand, it permits *other parties* to sue a nonresident based on the activities of the nonresident's agent. For example, Sheikh Mahfouz could be subject to Washington State's jurisdiction in a dispute with Boeing, or if Bawazir had injured a third-party in an automobile acci-

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[16] The Washington State Court of Appeals cited *New World Capital Corp. v. Poole Truck Line, Inc.*, 612 F. Supp. 166, 172 (S.D.N.Y. 1985) and *Caballero Spanish Media, Inc. v. Betacom, Inc.*, 592 F. Supp. 1093, 1095-96 (S.D.N.Y. 1984) in support of its holding. Appendix 24a.

dent in Washington State. On the other hand, the Washington State rule precludes the agent from suing the principal for the *same activities* that have conferred jurisdiction over the nonresident in any other context.

This asymmetry creates a paradox: a nonresident has purposefully subjected himself to the jurisdiction of the state based on the activities of his agent, *except* if his agent is the plaintiff. In other words, jurisdiction rests solely upon *who the plaintiff is in the lawsuit,* not whether the *defendant* purposefully availed himself by directing his agent to conduct business in the forum state. This cannot be the law. This Court long ago dispensed with the notion that jurisdiction is somehow dependent upon the identity of the plaintiff. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (the proper focus is on the "relationship among the *defendant,* the forum, and the litigation") (emphasis added) (citations omitted).

This Court should grant review to settle this issue and correct the Washington State Court of Appeals' holding, which improperly places the focus on the plaintiff, not the defendant, in determining whether the purposeful availment requirement under the Due Process Clause is satisfied.

C. The Washington State Decision Conflicts with This Court's Precedent, Which Holds That When a Claim Arises from a Contract That Has a Substantial Connection with the Forum State, The Purposeful Availment Requirement Under The Due Process Clause Is Satisfied.

The Washington State Court of Appeals conceded that Bawazir's claims against Sheikh Mahfouz "rest primarily on the Agreement between Mahfouz and Boeing." Appendix 22a. However, the court then ruled "that agreement is *irrelevant* in determining whether personal jurisdiction over Mahfouz exists in an action brought by Bawazir." *Id.* (emphasis added). Rather, the Washington State Court of Appeals ruled purposeful availment could only be established with respect to the oral agreement entered into between Bawazir and Sheikh Mahfouz, and purposeful availment could not be established because that oral agreement occurred abroad. Appendix 21a-22a.

The Washington State Court of Appeals improperly segregated one agreement from the other. Sheikh Mahfouz's agreement with Bawazir would not exist but for the Agreements he entered into with Boeing. Indeed, Boeing acknowledged "*Bawazir's claims are based on the Agreement.*" Appendix 71a-72a n.2 (emphasis added). The Washington State Decision thus conflicts with this Court's ruling that specific jurisdiction may be asserted over a nonresident defendant if the suit "arise[s] out of or relate[s] to" defendant's activities with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

Further, the Washington State Decision ignores the underpinnings of Bawazir's claim: a fair share of the commissions owed and to be paid under the Agree-

ments. In fact, after Boeing issued a multi-million dollar commission check to Bawazir, Sheikh Mahfouz instructed Boeing by a letter addressed to its "Chairman" to stop issuing commission payments to Bawazir. Appendix 49a ¶55. This was an act of purposeful availment which inextricably connects Sheikh Mahfouz (and Bawazir's claims) to Washington State. Sheikh Mahfouz's relationship with Washington State "can in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.' " *Burger King* at 480.[17]

So long as Sheikh Mahfouz "purposefully derive[d] benefit" from his interstate activites with Washington State, he should not be allowed to avoid the "consequences that arise proximately from such activities." *Burger King*, 471 U.S. at 473-74. The fact that Bawazir and Sheikh Mahfouz entered into an oral agreement abroad does not negate Sheikh Mahfouz's purposeful availment with Washington State because the claims arise from commissions paid under the Agreements pursuant to an oral agreement to be performed, in large part, in

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[17] *See also Afram Export Corp. v. Metallurgiki Halpys, S.A.*, 772 F.2d 1358, 1361-64 (7th Cir. 1985) (Posner, J.) (five-hour visit in the forum by the Greek defendant's independent agent sufficient to satisfy the purposeful availment requirement even though the contract was formed by an exchange of trans-Atlantic telexes because the state provided "police and fire protection" to the agent and the dispute arose from the contract). Sheikh Mahfouz not only received fire and police protection when he visited Boeing's headquarters to resolve financing issues, he was required to pay fees for landing his aircraft at Boeing Field. King County Code 15.60.010 ("No person shall allow any aircraft owned by him or under his control to land, take off, use B.F.I. [Boeing Field] facilities" without paying "all applicable landing, tie-down or other fees").

Washington State.[18] *See* CP 677-78; Appendix 40a, 41a, 44a ¶¶ 27, 29, 37.

The Washington State Decision cannot be reconciled with this Court's finding that purposeful availment under the Due Process Clause may be satisfied so long as "the suit was based on a contract [i.e., the Boeing Agreements] which had a substantial connection" with the forum state. *See McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). This Court should grant this Petition, in part, because the Washington State Decision threatens to erode the legitimate and "expanding reach" of the Due Process Clause by insulating contracts formed abroad, even though the underlying agreement giving rise to the claims is inextricably linked to the forum state.

D. The Washington State Decision Crafts an Unduly Narrow Rule Never Decided by This Court by Requiring a Nonresident to "Solicit" Contacts with the Forum State To Satisfy the Purposeful Availment Requirement Under the Due Process Clause.

The Washington Court of Appeals found "persuasive" that Sheikh Mahfouz did not satisfy the purposeful availment requirement under the Due Process Clause because he did not "solicit[ ]" to become Boeing's con-

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[18] *See also CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1267 (6th Cir. 1996) ("if a defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts"); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209 (7th Cir. 1984) (purposeful availment requirement satisfied, even though nonresident plaintiff never negotiated contract with nonresident defendant in the forum state, because the claim "lies in wake" of the nonresident's commercial activities in the forum state).

sultant. Appendix 23a. Under this rule, nonresidents must "solicit" the initial contacts with the forum state to satisfy the purposeful availment requirement under the Due Process Clause, regardless of any other purposeful contacts a nonresident may have with the forum state.

This Court has never required that a nonresident defendant initiate or solicit contacts with the forum state to satisfy the purposeful availment requirement under the Due Process Clause. Rather, parties who " '*create continuing relationships and obligations* with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King*, 471 U.S. at 473 (emphasis added).

Other courts have ruled that the failure to initiate or solicit business contacts with the forum does not vitiate the purposeful availment requirement under the Due Process Clause so long as the defendant enters into continuing obligations with the forum.[19] These rulings conflict with other lower courts, like Washington State, which

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[19] *See, e.g., Logan Prods., Inc. v. Optibase, Inc.*, 103 F.3d 49, 53 (7th Cir. 1996) ("the constitutionality of jurisdiction does not turn on which party 'started it' "); *Roth v. Garcia Marquez*, 942 F.2d 617, 622 (9th Cir. 1991) (fact that plaintiff "initiated" business contacts with nonresident defendant did not vitiate defendant's purposeful availment when the "contract's subject would have a continuing and extensive involvement with the forum"); *Electro-Craft Corp. v. Maxwell Elecs. Corp.*, 417 F.2d 365, 369 (8th Cir. 1969) (although defendant did not initiate negotiations it "actively and voluntarily participated in them thereafter"); *Viking Eng'g. & Dev., Inc. v. R.S.B. Enters., Inc.*, 608 N.W.2d 166, 170 (Mn. Ct. App. 2000) (fact that nonresident did not initiate contacts with the forum state will not preclude the exercise of jurisdiction under the Due Process Clause when "subsequent interstate communications by this nonresident seller demonstrate an eagerness to enter a business transaction").

have denied jurisdiction when the nonresident did not initiate contacts with the forum state.[20]

In this age of global commerce, the Washington State Decision establishes a dangerous precedent of stripping states with the power of maintaining actions over nonresidents, through adherence to a formalistic rule that the purposeful availment requirement cannot be satisfied unless the nonresident "solicited" contacts with the forum state. This is contrary to this Court's jurisprudence, which has "abandoned more formalistic tests . . . in favor of a more flexible inquiry" as to whether a defendant's contacts with the forum state make it reasonable under the Due Process Clause "to defend the suit in that Court." *Quill Corp. v. North Dakota*, 504 U.S. 298, 308 (1992).

This Court should grant review to reconcile the conflict among the lower courts as to whether the Due Process Clause permits the exercise of jurisdiction over foreign persons transacting business within the states, regardless of whether they initiated contacts with the forum state.

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[20] *See, e.g., Mellon Bank (East) v. DiVeronica*, 983 F.2d 551, 557 (3rd Cir. 1993) (personal jurisdiction was not favored when the defendant did not initiate contact); *Railcar, Ltd. v. Southern Illinois Railcar Co.*, 42 F. Supp. 2d 1369, 1374 (N.D. Ga. 1999) ("the courts in this circuit have found personal jurisdiction lacking where the Georgia plaintiff initiates contact with the out-of-state defendant"); *CFA Med., Inc. v. Burkhalter*, 383 S.E.2d 214, 216-17 (N.C. Ct. App. 1989) (failure to initiate contact with the forum a "critical factor" in finding that the purposeful availment requirement was not satisfied).

CONCLUSION

Washington State's interpretation of the Due Process Clause threatens to create a chilling effect on international commerce. It creates an unduly narrow rule of when foreign parties may be haled into court consistent with "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316.[21] Furthermore, it contravenes this Court's admonition that "the Due Process Clause may not be readily wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King*, 471 U.S. at 474.

In addition, the Washington State Decision is clearly at odds with the rulings of this Court as to when the purposeful availment requirement under the Due Process Clause is satisfied. Review is also necessary to resolve a conflict among the lower courts when nonresidents satisfy the purposeful availment requirement under the Due Process Clause by acting through agents or creating continuing obligations with the forum state although they did not "initiate" the transaction.

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[21] *See Burger King*, 471 U.S. at 476 ("It is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus *obviating the need for physical presence within a State in which business is conducted*") (emphasis added).

This Court should grant this Petition to preserve the due process principles embodied in more than half a century of American jurisprudence. Left undisturbed, the Washington State Decision threatens to erode these fundamental principles, and forestall America's ability to compete in the global marketplace.

Respectfully submitted,

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